UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1241

KNOLL, MADELIN H.,

Appellant

v.

SPRINGFIELD TOWNSHIP SCHOOL DISTRICT, a political subdivision of the Commonwealth of Pennsylvania; ROMAN, LOUIS A., Superintendent, Springfield Township School District; LAWN, JOHN J., HANSHAW, MARIE M., COMMINS, JAMES A., GOREN, SARA LEE, HOCH JR., WILLIAM C., HOGUE JR., E. BURKE, KALISH, SALLY, LIEBERMAN, MAX L. and TOBIN, HARPUR M., individually and as members of the Board of School Directors, Springfield Township School District

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 81-1626)

Submitted Under Third Circuit Rule 12(6)
January 6, 1983

Before: ALDISERT, GIBBONS, and HIGGINBOTHAM,
Circuit Judges

(Filed January 27, 1983)

Theodore M. Lieverman, Esquire
1425 Walnut Street
Philadelphia, Pennsylvania 19102
COUNSEL FOR APPELLANT

Charles Potash, Esquire
Harris F. Goldich, Esquire
Wisler, Pearlstine, Talone, Craig
& Garrity
515 Swede Street
Norristown, Pennsylvania 19401
COUNSEL FOR APPELLEE

OPINION OF THE COURT

ALDISERT, *Circuit Judge*.

Until recently, Pennsylvania's omnibus six-year statute of limitations, set forth in the Act of March 27, 1713,[1] properly governed employment discrimination suits brought in Pennsylvania under the federal Civil Rights Acts. By 1978, however, Pennsylvania had repealed the Act of 1713 and completely revised its statutes of limitations.[2] The major question before us is whether a new six-month statute of limitations governing suits against government officials applies to employment discrimination claims brought under 42 U.S.C. §1983.[3] We hold that because application of the

1. Pa. Stat. Ann. tit. 12, §31 (Purdon 1953 & Supp. 1982) (repealed 1978).

2. *See* Act of July 9, 1976, 42 Pa. Cons. Stat. Ann. §§5521-5536 (Purdon 1981).

3. 42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

six-month limitations period would be inconsistent with the policies and legislative history underlying §1983, and because none of Pennsylvania's more specific limitations provisions would apply, that the six-year residuary provision of the limitations schema should govern this dispute. We, therefore, reverse that part of the district court's judgment which determined that appellant's §1983 claim was time-barred after six months. This appeal also asks us to review the district court's rejection of appellant's claim of employment discrimination brought under Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. §2000e-e-17, as time-barred. We reverse that part of the judgment as well.

I.

For the purposes of our decision, we take as true the material facts alleged in the complaint. They are not complicated. On December 12, 1980, appellant Madelin H. Knoll, a teacher employed by the Springfield Township School District, filed a charge with the United States Equal Employment Opportunity Commission (EEOC), alleging that her employer had discriminated against her on the basis of sex in failing to promote her to several administrative positions. On January 28, 1981, the EEOC issued her a right to sue letter and dismissed the charge as untimely filed. On April 21, 1981, she filed a civil action in the district court against the school district and the individual members of the school board contending that the school district's failure to promote her to the position of Administrative Assistant to the Superintendent in July 1979, and later to Assistant Superintendent in September 1980, violated §703 of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. §2000e-2.

The complaint further alleged that the individual school directors had acted under color of state law to deny appellant the equal protection of the laws under the fourteenth amendment, in violation of §1983.[4]

The school district and the individual members of the school board moved for summary judgment, arguing, *inter alia*, that both claims were barred by statutes of limitations. After oral and written argument, the district court agreed. It ruled that the §1983 action was time-barred by the new Pennsylvania statute which limits actions against government officials to six months, and that the Title VII claim was time-barred because it

4. She averred in her complaint, *inter alia*, that:

1) she was fully qualified and certified for the position of Administrative Assistant to the Superintendent of the School District for which she applied in July 1979;

2) she was notified by Superintendent Louis A. Roman on August 2, 1979 that he had chosen Frank Romano, a male applicant with fewer qualifications and no Pennsylvania Department of Education certification, to be his Administrative Assistant;

3) shortly thereafter, Superintendent Roman promised he would create an administrative position for her during the 1979-80 school year as compensation for not having chosen her for the position of Administrative Assistant, that no such position was created, and that on May 28, 1980, Roman wrote her that he would not, in fact, create such a position for her during the next school year;

4) in September 1980, Administrative Assistant Frank Romano was promoted to Assistant Superintendent, a position which had existed in the past but was recreated specifically for him;

5) although the school district, its officers, agents, and representatives, knew that she was willing and qualified to assume the position of Assistant Superintendent in September 1980, she was not offered an opportunity to compete for the vacancy and was not considered for same because of her sex;

6) the decisions not to promote her to administrative positions in July 1979, May 1980, and September 1980 were the result of a continuing policy of sex discrimination by the school district and its officers, agents, and representatives.

was filed more than 180 days from the last discriminatory act which the court determined occurred in July 1979. The district court thus granted the summary judgment motion and dismissed the complaint. From this decision and order, Ms. Knoll appeals.

II.

Appellant's primary contention is that the district court erred in applying Pennsylvania's six-month statute of limitations to her claim of employment discrimination under §1983. That limitations provision, enacted as part of the new Pennsylvania Judicial Code, provides:

> (b) Commencement of action required — The following actions and proceedings must be commenced within six months:
>
> (1) An action against any officer of any government unit for anything done in the execution of his office, except an action subject to another limitation specified in this subchapter.

42 Pa. Cons. Stat. Ann. §5522(b)(1)(Purdon 1981).

She argues that instead the residuary provision of Pennsylvania's limitations schema should govern her cause of action. That Code provision establishes a six-year limitations period for:

> Any civil action or proceeding which is neither subject to another limitation specified in this subchapter nor excluded from the application by a period of limitation by section 5531 (relating to no limitation).

42 Pa. Cons. Stat. Ann. §5527(6) (Purdon 1981). To support her argument, appellant maintains that the six-month limitations provision is not the most analogous state statute to apply to a §1983 action, that its application is inconsistent with federal policy, and that the application of different statutes of limitations to govern-

ment and nongovernment defendants violates her right to equal protection under the law.

Appellant's next contention is that the district court erred in determining that her Title VII claim was time-barred. She argues that because appellees engaged in a continuing policy of discrimination, her charge was filed within 180 days of the last discriminatory act, as required by statute.

In reviewing the district court's summary judgment order, we are guided, as was the trial court, by the standard set forth in Rule 56(c), F. R. Civ. P.: summary judgment is proper when it appears "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See Goodman v. Meade Johnson & Co.*, 534 F.2d 566, 573 (3d Cir. 1976). With this standard in mind, we will address first the question of the statute of limitations applicable to a §1983 action. In so doing, we note that because the parties do not contest any material fact applicable to that action, we can only uphold the summary judgment ruling as to appellant's §1983 claim if we find that the six-month statute of limitations applies, as appellees contend, as a matter of law.

III.

Because Congress has not prescribed a specific statute of limitations for actions brought under §1983, it is necessary to borrow "the state law of limitations governing an analogous cause of action." *Board of Regents v. Tomanio*, 446 U.S. 478, 483-84 (1980). Selection of the appropriate state limitations provision "requires characterization of the essential nature of the federal claim within the scheme created by the various state statutes of limitation." *Davis v. United States Steel Supply*, 581 F.2d 335, 337 (3d Cir. 1978). *See also Skehan v. Board of Trustees*, 590 F.2d 470, 476 (3d Cir. 1978), *cert. denied*, 444 U.S. 832 (1979); *Myers v. Pennypack Woods Home*

Ownership Ass'n, 559 F.2d 894, 900 (3d Cir. 1977), *Polite v. Diehl*, 507 F.2d 119, 122 (3d Cir. 1974) (in banc).

We have analogized a claim of employment discrimination brought under the federal Civil Rights Acts, to "those torts which involve the wrongful interference with another's economic rights or interests." *Skehan*, 590 F.2d at 477 (quoting *Davis*, 581 F.2d at 339). Although these federal Civil Rights Acts do not create federal tort law, they do create, *inter alia*, a right to be accorded equal status, free of gender-based discrimination in the pursuit of personal economic interests.

Review of the new Pennsylvania limitations schema, however, fails to reveal any provision expressly applicable to claims for the torts of wrongful discharge or interference with contractual or economic rights. *See* 42 Pa. Cons. Stat. Ann. §§5521-5536 (Purdon 1981); *Riccobono v. Whitpain Township*, 497 F.Supp. 1364, 1375 (E.D.Pa. 1980). Further, courts considering these torts have ascertained the applicable limitations period by reference to the two residuary provisions of the limitations scheme — the six-month and the six-year statutes of limitations — which control only when the nature of the dispute falls outside one of the more specific limitations provisions. *Compare Clyde v. Thornburgh*, 533 F.Supp. 279 (E.D.Pa. 1982) (six-month limitations period applicable to §1983 action) *with Riddick v. Cuyler*, No. 81-0246 (E.D.Pa. July 16, 1981)(six-year limitations period applicable to §1983 action). Because appellant's claim does not fit under one of the specific provisions, we must determine which of the two residuary provisions governs her §1983 action.

Our focus in this inquiry must shift from probing the nature of the cause of action — which is irrelevant once the more specific, non-residuary provisions have been discounted as inapplicable — to determining which statute of limitations the Pennsylvania courts would have applied had this action been brought under state law. Because the six-year limitation only applies if

the six-month limitation does not, we must first determine whether the courts would have applied the shorter limitation period to an employment discrimination suit brought against public officials under state law. Because appellant seeks relief from the school district and related officials for their unconstitutional actions in discriminating against her in her employment, she clearly brings "an action against any officer of any governmental unit for anything done in the execution of his office." 42 Pa. Cons. Stat. Ann. §5522(b)(1)(Purdon 1981). We conclude, therefore, that if she had brought her action in state court under state law, it would have been subject to the six-month limitations period. *See Clyde*, 533 F.Supp. at 286; *Eshmont v. Commonwealth*, No. 1390 (Pa. Commw. Ct. Nov. 24, 1981).

IV.

The court's authority to borrow a state statute of limitations to fill a void in federal law is not, however, unbounded. In 42 U.S.C. §1988, from which this borrowing authority is derived, Congress instructs the courts to turn to "the common law, as modified and changed by the constitution and statutes of the [forum] State," so long as it is "not inconsistent with the Constitution and laws of the United States." *See Robertson v. Wegmann*, 436 U.S. 584, 588 (1978); *Moor v. County of Alameda*, 411 U.S. 693, 702-03 (1973). This instruction reflects Congress' view that a borrowed state statute serves only as the source of the federal law which appropriately governs federal civil rights actions. When poured into the federal vessel, the state statute becomes a federal legal precept, and all aspects of the proceeding must be measured by the federal interest implicated in the case. This limitation on the absorption of state law is necessary because "[s]tate legislatures do not devise their [statutes of limitations] with national interests in mind[. I]t is the duty of the federal courts[, therefore,] to assure that the importation of state law will not frustrate

or interfere with the implementation of national policies." *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355, 367 (1977). Thus, in considering the potential applicability of Pennsylvania's six-month statute of limitations, we must keep as our polestar the precept that the analogous state law should not be borrowed if it is "inconsistent with the federal policy underlying [§1983]." *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 465 (1975).

After carefully considering §1983's legislative history, the Supreme Court articulated four major policies underlying the statute. First, it can "override certain kinds of state laws," to-wit, "any invidious legislation by states against the rights or privileges of citizens of the United States." *Monroe v. Pape*, 365 U.S. 167, 173 (1961). Second, "it provide[s] a remedy where state law [is] inadequate." *Id.* Third, it provides "a federal remedy where the state remedy, though adequate in theory, [is] not available in practice." *Id.* at 174. Finally, it provides "a remedy in the federal courts supplementary to any remedy any State might have." *McNeese v. Board of Educ.*, 373 U.S. 668, 672 (1963). In sum, §1983 offers "a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation." *Mitchum v. Foster*, 407 U.S. 225, 239 (1972). It should thus be accorded "a sweep as broad as its language." *Griffin v. Breckenridge*, 403 U.S. 88, 97 (1971) (quoting *United States v. Price*, 383 U.S. 787, 801 (1966)).

We conclude that if we were to apply Pennsylvania's six-month statute of limitations, we would contravene the remedial purpose of federal civil rights actions and deny appellant the breadth of §1983's sweep. We would be forced to ignore Justice Harlan's insightful observation that "a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state

tort and the deprivation of a constitutional right." *Monroe*, 365 U.S. at 196 (Harlan, J., concurring). And we would ultimately defy congressional intent. In so concluding, we are influenced by pragmatic considerations as well as the legislative history and conceptual underpinning of the federal rights herein sought to be vindicated.

A.

Although actions under §1983 have been permitted since 1871, the use of this remedial vehicle in the modern era dates back only to 1961 and the landmark case of *Monroe v. Pape*, in which the Court courageously blazed a new and wide trail in constitutional law for the dual purposes of compensating persons injured by deprivation of federal rights and preventing abuses of power by those acting under color of state law. Since that decision, the definition of rights and remedies under the Civil Rights Acts has been an ongoing, dynamic process. Although experienced federal and state judges, members of the professoriat, and many, but not all, lawyers may be acutely aware of this definitional process, this professional familiarity is not widespread among members of the public. We are persuaded, therefore, that the average plaintiff who has been injured by state action is not sufficiently conversant with the intricacies and subtleties of constitutional law to recognize the constitutional deprivation, consult a lawyer, and prepare a case for filing in court within six months. Such a short statute of limitations is not "sufficiently generous in [its] time period[] to preserve the remedial spirit of federal civil rights actions." *Childers v. Independent School Dist.*, 676 F.2d 1338, 1343 (10th Cir. 1982) (quoting *Shouse v. Pierce County*, 559 F.2d 1142, 1146 (9th Cir. 1977)).

B.

In addition, while the equal protection clause is not designed to create uniformity out of political, economic,

and cultural diversity, it does command that the state treat every person with equal care and respect. When there is evidence that the state failed to accord such treatment, there is evidence that individuals' constitutional rights may have been violated. The decisions of courts seeking to vindicate these rights, as here, indicates that we are close to fulfilling Karl Llewellyn's prophecy of a half century ago:

> [T]he focus of study, the point of reference for all things legal has been shifting, and should now be consciously shifted to the area of contact, of interaction, between official regulatory behavior and the behavior of those affecting or affected by official regulatory behavior. . . .[5]

If, with Dean Eugene V. Rostow, we agree that the purpose of the Constitution is to assure the people a free and democratic society and that the final aim of that society is to provide as much freedom and equality as possible for individuals, we can also agree that there has been no procedural device in the modern era that has guaranteed those assurances more than the remedies available through §1983. This statute furnishes bone and sinew to what Dean Rostow described as the root idea of the Constitution: "man can be free because the state is not."[6] Desirable public policy, as evidenced by volumes of reported cases at all levels of the judiciary, is that the courthouse doors be open for, rather than closed to, the vindication of these individual rights alleged to have been threatened by official regulatory behavior.

Applying a six-month statute of limitations would have a decided tendency to severely limit access to the

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5. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 Colum. L. Rev. 431, 464 (1930).

6. Rostow, *The Democratic Character of Judicial Review*, 66 Harv. L. Rev. 193, 195 (1952).

courts for the purpose of vindicating these individual rights. It would be counterproductive to the popular recourse to the Civil Rights Acts. And it also would fly in the face of Cardozo's admonition that "the final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence."[7]

C.

Even if application of the six-month limitations provision would not contravene the remedial spirit of the federal Civil Rights Acts, it would be inconsistent with the legislative history and subsequent judicial construction of those Acts. Section 1983 derives from § 1 of the Civil Rights Act of 1871. Act of April 20, 1871, ch. 22, §1, 17 Stat. 13. State action is required for it to become operative. Because §1983 represents only one section of the 1871 Act, however, it should not be considered *in vacuo*, and interpretive reference should be made to other relevant provisions, such as §2 of the Act, now codified as §1985(2),[8] which reaches private action. *See Griffith*, 403 U.S. at 96-101.

In considering the legislative history surrounding these two provisions of the 1871 Act,[9] we have unearthed no evidence that Congress intended one limitations period to apply to suits brought under §1, where state action is required, and another period to apply to §2 suits implicating private action. But if we apply the literal language of the new Pennsylvania statutes of limitations, that is exactly what results. Because government officials are uniformly defendants in §1983 suits, the six-month limitations provision of §5522(b)(1) would govern their causes of action; whereas a §1985(2) suit against a non-government defendant would always be subject to one of the other limitations provisions.

In addition to §§1983 and 1985, several other statutes comprise the remainder of the federal Civil Rights Acts. An examination of two of these statutes, 42 U.S.C. §1981[10] and 1982,[11] which, like §1985, reach private action, highlights the ananolous result that can stem from applying different statutes of limitations to suits involving private and public defendants.

Suits brought under §§1981 and 1982 against private defendants, like those brought under §1985, would never be subject to Pennsylvania's six-month statute of limitations. In fact, we have recently held that a claim based on §1981, charging a private employer with failure to protect an employee from harassment because of race, would be subject to a six-year statute of limitations.

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7. B. Cardozo, The Nature of the Judicial Process 66 (1921).

8. 42 U.S.C. §1985(2) punishes persons who, *inter alia*:

> conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws.

For the original draft of §2 of the Act of 1871 and a history of its subsequent codification by Secretary of State Hamilton Fish in 1874, see *Brauer v. Horowitz*, 535 F.2d 830, 837-41 (3d Cir. 1976).

9. *See e.g.*, The Reconstruction Amendments' Debates 484-570 (Va. Comm'n. on Const. Gov't 1967) (setting forth excerpts of the debates reprinted in the Congressional Globe, 42d Cong., 1st Sess. (1871)).

10. 42 U.S.C. §1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

11. 42 U.S.C. §1982 provides:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

Davis, 581 F.2d at 341. We also have held that a claim based on §§1981 and 1982, alleging a wrongful refusal to sell or rent housing, would be subject to a six-year limitations period. *Meyers*, 559 F.2d at 903. Even though these decisions pre-date the recodification of Pennsylvania's statutes of limitations, because they involve private defendants in discrimination actions that would not be covered by the more specific provisions of the new Code, the residuary six-year period of limitations would still apply were these suits instituted today under the new limitations schema.

We refuse to believe, however, that Congress intended to sanction the application of a six-year limitations period to federal civil rights actions involving housing or race discrimination where the parties were private citizens, but only a six-month statute of limitations to otherwise identical actions involving public officials. Such a result would be contrary to the statutory schema adopted in 1871 in which Congress addressed in one comprehensive statute both public and private discrimination. "It is abundantly clear that one reason [§1983] was passed was to afford a federal right in federal courts because . . . the claims of citizens to the enjoyment of the rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by state agencies." *Monroe*, 365 U.S. at 180. To constrict this right by imposing a six-month limitations statute where there are public defendants would, in our view, run completely counter to the intent of the 1871 Congress. Because we reject the application of the shorter limitations provision as violative of the policy and legislative history underlying §1983, we need not go on to address appellant's constitutional argument that applying different limitations provisions to government and nongovernment defendants violates her rights to equal protection. *See Ashwander v. TVA*, 297 U.S. 288, 341 (Brandeis, J., concurring).

D.

"We are not at liberty to seek ingenious analytical instruments" that would dilute the power of §1983 or the majesty of its objectives. *See Price*, 383 U.S. at 801. Accordingly, we hold that the district court erred in applying Pennsylvania's six-month statute of limitations to this §1983 action as a basis for granting appellee's summary judgment motion. The void created by Congress' failure to establish a statute of limitations for §1983 actions cannot be filled with a state limitations provision which is inconsistent with the federal interest sought to be vindicated. In addition, we conclude that Pennsylvania's residuary six-year statute of limitations, which applies in the absence of another applicable limitations provision, should govern this §1983 action because it "better serves the policies expressed in the federal statute[]." *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 240 (1969).

V.

We now turn to appellant's claim of employment discrimination based on a violation of Title VII. We first note that because a cause of action under §1983 is distinct and independent, and has different procedural, jurisdictional, and remedial characteristics from a Title VII action, that appellant has the right to proceed under both statutes. *Scott v. University of Del.*, 601 F.2d 76, 79 n.2 (3d Cir.), *cert. denied*, 444 U.S. 931 (1979). Moreover, the legislative history of Title VII supports "the clear inference . . . that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48-9 (1974).

To affirm the district court's summary judgment order, we must determine that there existed no dispute as to any material fact and that defendants were entitled to judgment as a matter of law. *Goodman*, 534 F.2d at 573.

Neither this court on appeal nor the district court at trial is authorized, in approving a summary judgment order, to decide disputed issues of fact; our sole task is to determine whether an unresolved issue of material fact existed at the time the ruling was made. *Id.* Accordingly, we must view inferences from facts contained in the evidentiary materials submitted to the district court in the light most favorable to the party opposing the summary judgment motion. *Id.* That party's allegations must be taken as true and, when those assertions conflict with those of the movant, the former must receive the benefit of the doubt. *Id.*; see, e.g., *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)(per curiam); *Smith v. Pittsburgh Gage & Supply Co.*, 464 F.2d 870, 874 (3d Cir. 1972).

By its terms, Title VII requires that a charge be filed with the EEOC within 180 days of the alleged discriminatory act. This requirement operates as a statute of limitations, such that a complainant's failure to file within this period operates to bar relief in federal court on the merits. *Zipes v. Trans World Airlines, Inc.*, 50 U.S.L.W. 4238, 4240-41 (U.S. Feb. 24, 1982). The district court found that the last act of discrimination took place in July, 1979 when appellant's application for the post of Administrative Assistant was denied. We must decide, therefore, not whether this district court determination was correct, but whether in making it, the district court impermissibly resolved a disputed issue of materal fact.

Before us, appellant urges, as she did before the district court, that the appellees engaged in a continuing policy of discrimination. She contends that the school district committed three distinct acts of discrimination, to-wit, on August 2, 1979 when the male applicant Romano was hired as Administrative Assistant; on or about May 28, 1980 when the Superintendent notified her that he would not, as promised, create an administrative position for her during the next school year; and

in September 1980 when Romano was promoted to Assistant Superintendent. She maintains that appellees' policy of discrimination existed in 1979 and lasted through September, 1980.

In determining the motion for summary judgment, the district court had before it only plaintiff's complaint, her exhibits, the answer, the briefs, and its recollection of oral argument. The parties did not supply the court, and the materials furnished us do not disclose, any depositions, answers to interrogatories, and admissions on file, together with supporting affidavits, which are permitted in summary judgment procedures under Rule 56(e), F. R. Civ. P.

In her complaint plaintiff averred:

> 22. The decisions not to promote Plaintiff Knoll into an administrative position in July 1979, May 1980 and September 1980, were the result of a *continuing policy of discrimination* against Plaintiff on the basis of sex by the School District and its officers, agents and representatives acting within the scope of their authority and on behalf of the School District.

(Emphasis added). The defendants presented a general denial, but no countervailing facts to dilute her averment of a continuing policy of discrimination.

In the context of a summary judgment proceeding, we must accept as true plaintiff's averment that defendants maintained a continuous policy of discrimination that lasted into September, 1980. However, we do not hold that plaintiff proved her contention as to when the last discriminatory act occurred, only that whether that last act occurred in September 1980 is a material fact that was still in dispute at the time the district court granted the summary judgment motion. Thus, the district court erred when it determined that, as a matter of law, appellant's Title VII claim was time-barred. *See*

Reed v. Lockheed Aircraft Corp., 613 F.2d 757 (9th Cir. 1980).

VI.

Accordingly, we will reverse the summary judgment order of the district court and remand the cause for further proceedings.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MADELIN H. KNOLL	:	CIVIL ACTION
v.	:	
SPRINGFIELD TOWNSHIP	:	
SCHOOL DISTRICT, et al.	:	NO. 81-1626

MEMORANDUM OF DECISION

McGLYNN, J. March 17, 1982

This case raises questions concerning the effect of the Civil Rights Act of 1964 (hereinafter referred to as "Title VII") on the Civil Rights Acts of 1866 and 1871 (hereinafter individually referred to as "Sections 1981, 1983 and 1985"). In order to establish the proper foundation needed to discuss these issues, a brief recitation of the facts is in order.

Plaintiff, Madelin Knoll, has been employed by the defendant school district of Springfield Township as a full-time educational professional since 1968. In July of 1979 plaintiff applied for and was denied the position of administrative Assistant to the Superintendent of the School District. Mr. Frank Romano was given this position. According to plaintiff, the Superintendent orally promised to create a position for plaintiff to appease her for not being selected. In May 1980 plaintiff was informed that no new position had been created. In September 1980 Mr. Frank Romano was promoted to Assistant Superintendent.

On December 12, 1980 plaintiff filed a charge with the Equal Employment Opportunity Commission, (EEOC), claiming that she had been discriminated against with regard to the above positions because of her sex. The Commission dismissed the charge as untimely filed stating that the charge was received more than 180

days after the date of the alleged violation[1] and issued a right to sue letter.[2]

Though not expressly stated by the EEOC, it is implicit in its dismissal of the charge as untimely that the EEOC read plaintiff's charge as alleging that the most recent discriminatory act occurred in July or August 1979. Thus the filing of the charge in December 1980, almost a year and a half after the alleged act of discrimination was not within the 180 day filing period. Plaintiff claims however that the EEOC determination was incorrect because the last act of discrimination alleged in the charge took place in September 1980 when Romano appointed Assistant Superintendent and therefore the charge filed on December 1980 was within the 180 day period required by Title VII.

In addition to her Title VII claim, plaintiff brings a separate claim based on 42 U.S.C. §1983 alleging that the same operative facts violated her right to equal protection guaranteed by the Fourteenth Amendment.[3] Presently before the Court is Defendant's Motion for Summary Judgment on both claims.[4]

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1. Under Title VII, cases of alleged employment discrimination are subject to a detailed administrative and judicial process. (The Statute requires that a complaint be filed with the federal agency within 180 days "after the alleged unlawful employment practice occurred". If the complainant has filed a charge with a state or local agency, the time is extended to 300 days from the end of state or local proceedings, whichever is sooner. 42 U.S.C. §2000 e-5(c). In this case plaintiff has not averred that she instituted proceedings before a state agency, therefore the 180 days period applies.

2. After a right to sue letter issues from the EEOC the complainant is given another 90 days to bring a civil action in a federal district court, 42 U.S.C. §2000 e-5(f)(1), *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977).

3. This court has jurisdiction pursuant to 28 U.S.C. §§1331 and 1343.

4. Although defendants contend the court lacks subject matter jurisdiction, in fact, they are asserting that the action is barred by the statute of limitations which, as an affirmative defense, may be raised by a motion for summary judgment.

Title VII

Whether Plaintiff's Charge of Sex Discrimination in Employment was Timely Filed with the EEOC

In *Zipes v. Trans World Airlines, Inc.*, 50 U.S.L.W. 4238 (decided February 24, 1982) the Supreme Court held that a timely filing of a charge with the EEOC is not a jurisdictional prerequisite to bringing a Title VII suit in federal district court, but is rather a requirement similar to a statute of limitations. Therefore if plaintiff did not file her claim with the EEOC within the 180 day filing period provided for in Title VII, her present claim must be dismissed.[5]

Plaintiff asserts that this Court is not bound by the EEOC determination that the claim was not timely filed. *Alleman v. T.R.W., Inc.*, 13 FEP 982 (M.D.PA. 1974); *Trent v. Allegheny Airlines, Inc.*, 431 F. Supp. 345 (W.D.Pa. 1977) and urges us to make an independent determination of timeliness.

The thrust of plaintiff's argument is that defendants engaged in a continuing policy of discrimination and therefore a charge which challenges that policy is timely filed so long as it is filed within 180 days of the latest act of discrimination. *Bethel v. Jendoco Construction Corporation*, 570 F.2d 1168 (3d Cir. 1978). The most recent act of discrimination in this case, according to plaintiff, took place in September 1980 when Romano was promoted to the position of Assistant Superintendent. Thus under plaintiff's analysis the charge filed in December of the same year was timely.

The problem with this theory is that the promotion of Romano in September 1980 did not discriminate against plaintiff. She had not even applied for that position. The crux of her claim is the denial by defendant of her application for the position of Administrative Assist-

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5. Plaintiff does not claim that waiver, estoppel or equitable considerations tolled the running of the limitations period.

ant in the summer of 1979. At that time of Mr. Romano was given the position which plaintiff sought. Plaintiff was discriminated against therefore, if at all, in 1979, not later in 1980 when Mr. Romano was elevated to a position for which plaintiff had not even submitted an application. While Romano may have been the beneficiary of the initial act of discrimination, changes in his status subsequent thereto do not start the running of the limitation period anew.

Therefore, I agree with the EEOC determination that plaintiff's charge was untimely filed. Accordingly, I grant defendant's motion as to plaintiff's Title VII Claim.[6]

1983

Whether the Dismissal of a Title VII Claim on the Ground That It Was Untimely Filed Precludes The Bringing of a Section 1983 Cause of Action Based On The Same Operative Facts

Defendants would have the court answer this question in the affirmative arguing that to do otherwise would allow plaintiff to circumvent the comprehensive procedural machinery of Title VII which was specifically enacted for employment discrimination cases. Defendants cite *Great American S. and L. Association v. Novotny*, 442 U.S. 366 (1979) in support of their stand. The plaintiff in *Novotny*, filed a charge with the EEOC and after receiving a right to sue letter filed suit in district court under Section 1985. After detailing the procedural plan devised by Congress for discrimination claims under Title VII, the Court stated "If a violation of Title VII could be asserted through §1985 (c) a complainant

6. This determination makes it unnecessary for the court to address the more specific issue raised by defendant concerning the barring of plaintiff's Title VII claim against the individual defendants for failure to name them as respondents in the EEOC complaint.

could avoid most if not all of these detailed and specific provisions of the law." *Id.* at 375-6. The court concluded that "[u]nimpaired effectiveness can be given to the plan put together by Congress in Title VII only by holding that deprivation of a right created by Title VII cannot be the basis for a cause of action under §1985(c)" *Id.* at 378.

Defendants argue that unlike §1981 which creates rights independent of Title VII (*Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975))[7], both §1983 and §1985 are purely remedial in nature and confer no substantive rights, and therefore plaintiff's §1983 claim ought to be barred for the same reason that *Novotny's* §1985 claim was barred.

Although the logic has surface appeal, it overlooks the fact that in *Novotny* the plaintiff was attempting to enforce a statutory right which prohibits sex discrimination in private employment while the plaintiff here is seeking redress for a Fourteenth Amendment equal protection violation. This plaintiff is not using §1983 to enforce Title VII but rather she seeks to recover damages for sex discrimination by persons acting under color of state law. This is an independent cause of action even though the underlying facts are the same and the potential remedies overlap a Title VII cause of action.

The interplay between Title VII and Section 1983 has not been directly addressed by the Supreme Court. However, the Third Circuit has consistently permitted plaintiffs to proceed under both Title VII and Section 1983. In *Scott v. University of Delaware*, 601 F.2d 76 (3d Cir. 1979) plaintiff "alleged individual claims of discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. §1981, and 1871, 42

7. But see *Brown v. General Services Administration*, 425 U.S. 820 (1976) which holds that Section 1981 cannot be used to attack federal discriminatory employment practices.

U.S.C. §1983." *Id.* at 79. The Court in *Scott* stated that "the cause of action under each of the Civil Rights Acts are distinct and independent, and have different procedural, jurisdictional, and remedial characteristics." *Id.* at 79, n.2 citing *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975). In *Bolden v. Pennsylvania State Police*, 578 F.2d 912 (3d Cir. 1978) the Court dealt with a claim based only on the Thirteenth and Fourteenth Amendments and 42 U.S.C. Sections 1981, 1983, 1985(3) and 1988. The court noted that "Although the complaint was filed on November 16, 1973, it did not allege a violation of Title VII of the Civil Rights Act of 1964, PUB. L. NO. 88-352, 78 Stat. 255, 42 U.S.C. §2000-e *et seq*. Apparently, the reason for this was the exemption for state and local governments originally incorporated in Title VII and not removed until March 24, 1972, the effective date of the Equal Employment Opportunity Act of 1972 PUB. L. NO. 92-261, 86 Stat. 103." *Id.* at 914 n.1.

District Courts likewise have determined that Section 1983 and Title VII afford parallel remedies. In *Johnson v. University of Pittsburgh*, 435 F. Supp. 1328 (W.D. Pa. 1977), the court characterized the case as a "double-barrelled suit brought under 42 U.S.C. §2000e forbidding sex discrimination and under the Civil War Civil Rights Acts, 42 U.S.C. §§1983 and 1985(3)." *Id.* at 1350. In *Morgan v. Sharon Pennsylvania Board of Education*, 472 F. Supp. 1157 (W.D. Pa. 1979) a school teacher brought suit against the school district alleging a claim of sex discrimination. Count one was based on Title VII and count two was based on Section 1983. Addressing the difference in the limitations afforded by both statutes the court stated:

> "It may seem paradoxical that plaintiff in Count two can rely upon alleged acts of discrimination which are foreclosed under Count one because of the shorter period provided by Title VII. *Congress, however, did not make the remedies under Title VII and Section 1983 mutually exclusive.* Plaintiff is therefore entitled to pursue relief under both counts, with each count governed by its own procedural standards."

Morgan v. Sharon Pennsylvania Board of Education, supra, at 1159 n.1 (emphasis added and citations omitted).

I would conclude therefore that even though §1983 is more akin to §1985, *Johnson* is controlling and the *Novotny* analysis must be rejected. "The legislative history of Title VII manifests a Congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes." *Alexander v. Gardner-Denver Company*, 415 U.S. 36, 48 (1974). Thus a judgment in favor of defendants on plaintiff's Title VII claim as time barred does not compel the dismissal of the Section 1983 claim.

Whether the Complaint States a Cause of Action Against the Springfield Township School District

This action was brought against the Springfield Township School District as well as the individual members of the District's School Board. There are no allegations that the plaintiff's failure to obtain the desired promotion resulted from the execution of the District's custom or policy. In *Monell v. Department of Social Services*, 436 U.S. 658 (1978), the court specifically refused to impose Section 1983 liability on the basis of respondeat superior stating:

> "We conclude, therefore, that a local government may not be sued under §1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official

policy, inflicts the injury that the government as an entity is responsible under §1983."

Id. at 695. Accordingly, plaintiff's §1983 claim against the Springfield Township School District will be dismissed.

Whether Plaintiff's §1983 Claim Against the Individual Members of the School Board Was Brought Within the Appropriate Statute of Limitations

There is no federal statute of limitations for actions brought under 42 U.S.C. §1983, see *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), therefore "the limitation to be applied is that which would be applicable in the courts in the state in which the federal court is sitting had an action seeking similar relief been brought under state law". *Polite v. Diehl*, 507 F.2d 119, 122 (3d Cir. 1974) (en banc): *See Meyers v. Pennypack Woods Home Ownership Association*, 559 F.2d 894, 900 (3d Cir. 1977).

The defendant school board members contend that plaintiff's claim would be barred by the six-month limitation period of 42 Pa. Cons. Stat. Ann. §5522(b)(1) which reads:

> (b) Commencement of action required — The following actions and proceedings must be commenced within six months:
>
> (1) An action against any officer of any government unit for anything done in the execution of his office, except an action subject to another limitation specified in this subchapter.

Id. The discriminatory conduct alleged in the complaint occurred in July or August 1979. Plaintiff did not commence this action until April 21, 1981, well beyond the six-month period of §5522(b)(1) and thus the defendants argue that plaintiff's claim against them should be dismissed.

Plaintiff contends that the six year statute of limitations contained in 42 PA. CONS. STAT. ANN. §5527(6) is applicable citing *Riddick v. Cuyler*, No. 81-0246, (E.D.Pa. filed July 16, 1981, per Newcomer, J.).

However, in *Clyde v. Thornburgh, et al.*, CA 81-1910 (E.D.Pa. filed Feb. 18, 1982, per Luongo, J.) a political discharge case, the court rejected the *Riddick* analysis and applied the six-month limitation of §5522(b)(1). The court reasoned that cases dealing with torts which interfere with another's economic rights or interests looked to the residuary provisions of Pennsylvania's limitations scheme and where the claim is against an officer of a government unit for action taken in the execution of his office the clear language of §5522(b)(1) compels the imposition of the six month limitation period. The court also pointed out that the restrictive view of *Riddick* which would apply §5522(b)(1) only to actions for injury to person and property would render that provision superfluous.

I am persuaded that the *Clyde* approach is correct and that "§5522(b)(1) represents the legislature's considered judgment that actions against public officials which are so uncommon that they do not fall within other specific limitations periods, should be brought within six months." *Clyde*, supra at 18.

Accordingly, since the §1983 action was not commenced against the individual members of the school board within six months of the constitutional violation it is barred.[8]

---

8. This would be true even assuming the act of discrimination was the promotion of Romano to Assistant Superintendent in September 1980.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MADELIN H. KNOLL	:	CIVIL ACTION
v.	:	
SPRINGFIELD TOWNSHIP SCHOOL DISTRICT, et al.	:	NO. 81-1626

ORDER

AND NOW, this 17th day of March, 1982, upon consideration of the defendants' motion for summary judgment and after consideration of the briefs and arguments of counsel, it is

ORDERED

that the motion for summary judgment be and the same is hereby GRANTED AND JUDGMENT is entered in favor of the defendants and against the plaintiff.

BY THE COURT

JOSEPH L. McGLYNN, JR. J.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 82-1241

KNOLL, MADELIN H., *Appellant*

v.

SPRINGFIELD TOWNSHIP SCHOOL DISTRICT, a political subdivision of the Commonwealth of Pennsylvania; ROMAN, LOUIS A., Superintendent, Springfield Township School District; LAWN, JOHN J., HANSHAW, MARIE M., COMMINS, JAMES A., GOREN, SARA LEE, HOCH, WILLIAM C. JR, HOGUE JR., E. BURKE, KALISH, SALLY, LIEBERMAN, MAX L. and TOBIN, HARPUR M., individually and as members of the Board of School Directors Springfield Township School District

(D.C. Civil 81-1626)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: ALDISERT, GIBBONS and HIGGINBOTHAM, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania submitted under Third Circuit Rule 12(6), January 6, 1983.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered March 19, 1982, be, and the same is hereby reversed and the cause remanded for further proceedings. Costs taxed against appellees.

ATTEST:

Sally Mrva

Clerk

January 27, 1983

Certified as a true copy and issued in lieu of a formal mandate on March 3, 1983.

Test:

Chief Deputy Clerk, United States Court of Appeals for the Third Circuit.

Costs taxed in favor of appellant as follows:

Brief	$143.37
Appendix	$ 50.49
Reply Brief	$ 19.80
TOTAL	$213.66

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1241

KNOLL, MADELIN H.,

Appellant

v.

SPRINGFIELD TOWNSHIP SCHOOL DISTRICT, a political subdivision of the Commonwealth of Pennsylvania; ROMAN, LOUIS A., Superintendent, Springfield Township School District; LAWN, JOHN J., HANSHAW, MARIE M., COMMINS, JAMES A., GOREN, SARA LEE, HOCH JR., WILLIAM C., HOGUE JR., E. BURKE, KALISH, SALLY, LIEBERMAN, MAX L. and TOBIN, HARPUR M., individually and as members of the Board of School Directors, Springfield Township School District

(D.C. Docket No. 81-1626)

SUR PETITION FOR REHEARINNG

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*

The petition for rehearing filed by Appellees in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, a majority of the circuit

judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judges Adams, Weis, Garth and Hunter would grant rehearing in banc.

BY THE COURT,

JOHN J. GIBBONS
Circuit Judge

Dated: February 23, 1983

STATEMENT OF JUDGE ADAMS SUR DENIAL OF PETITION FOR REHEARING

The panel decides that the six-month limitations period of 42 Pa. Cons. Stat. Ann. §5522(b)(1) (Purdon 1981) is inapplicable to actions brought under 42 U.S.C. §1983, because six months is so brief as to be inconsistent with the policies of section 1983. This position is taken despite the panel's recognition that in section 1983 actions the federal courts must normally borrow the state limitations period governing analogous causes of action, and that, had the present action been brought "in state court under state law, it would have been subject to the six-month limitations period." Slip op. at 8.

In holding that the six-month period is too constricting, the panel breaks with the two other circuits that have decided this issue. In *Burns v. Sullivan*, 619 F.2d 99, 106-107 (1st Cir. 1980), the court held that a six-month limitation is reasonable in section 1983 cases, and *Warren v. Norman Realty Co.*, 513 F.2d 730, 733-35 (8th Cir. 1975), applied a 180 day limit of a Nebraska statute of limitations to a federal action under 42 U.S.C. §1982.[1]

1. In *Major v. Arizona State Prison*, 642 F.2d 311 (9th Cir. 1981) the Ninth Circuit determined that a one year statute was not inconsistent with section 1983. *But cf. Childers v. Independent School District No. 1 of Bryan County, State of Oklahoma*, 676 F.2d 1334 (10th Cir. 1982), which held a 120 day limitations period for nonjudicial proceedings to be inconsistent with section 1983. In *Johnson v. Davis*, 582 F.2d 1316, 1319 (4th Cir. 1978), the court disregarded a special one year state statute of limitations for section 1983 actions in favor of the two year period of the general state statute, because of the absence of a "fair grouping and valuation of §1983 actions within the Virginia scheme of limitation periods [and because of the absence of] some other reasonable basis for applying a shorter period for remedying a 'constitutional tort' than for remedying the underlying state tort. . . ." The *Johnson* court held that to apply the special statute would be to "condone an unreasonable discrimination between the assertion of federally protected rights and rights under Virginia law," *id.* at 1317. The panel in the present case, however, does not suggest that the Pennsylvania six-month statute discriminates against federal rights. *See also Shouse v. Pierce County*, 559 F.2d 1142, 1146 (9th Cir. 1977) (refusing to borrow a 30 day period).

As the panel notes, this Court is not authorized to cure lacunae in federal law by borrowing state statutes of limitations that frustrate national policies. *See Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355, 367 (1977). But in its most recent declaration on the subject, the Supreme Court warned that state statutes of limitations are normally binding in section 1983 cases:

> In §1983 actions . . . a state statute of limitations and the coordinate tolling rules are more than a technical obstacle to be circumvented if possible. In most cases they are binding rules of law. In 42 U.S.C. §1988, Congress "quite clearly instructs [federal courts] to refer to state statutes" when federal law provides no rule of decision for actions brought under §1983. *Robertson v. Wegmann*, 436 U.S. 584 (1978). See also *Carlson v. Green*, [446 U.S. 14, 22 n.10 (1980)]. As we held in *Robertson*, by its terms, §1988 authorizes federal courts to disregard an otherwise applicable state rule of law only if the state law is "inconsistent with the Constitution and laws of the United States."

Board of Regents of the University of the State of New York v. Tomanio, 446 U.S. 478, 484-85 (1980) (footnote omitted).

The Supreme Court in *Tomanio* took occasion to reiterate its emphasis on "the importance of the policies underlying state statutes of limitations." *Id.* at 487. To gauge whether state limitations statutes are consistent with the policies underlying section 1983, *Tomanio* instructed the federal courts that "the state and federal policies which the respective legislatures sought to foster must be identified and compared." *Id.* at 487.

There is no indication that the opinion in the present case follows *Tomanio*'s direction to give weight to the significant policies underlying the state statute of limitations. Moreover, despite its description of the general policies behind section 1983, the panel has not explained with any precision why the six-month period cannot be squared with those policies. Indeed, much of the same reasoning that the panel employs in rejecting the limitations period of section 5522(b)(1) could equally be applied to strike down any limitations period, for any such period arguably circumscribes the broad sweep of section 1983. The panel has made no attempt to demonstrate with specific reference to the facts of this case that six months was insufficient for the plaintiff to file a complaint. Instead, without citing any evidence or empirical data, it speaks of this period as being too limited for the "average plaintiff." Slip op. at 10.[2] The panel does

2. It is worth noting that when Congress has prescribed periods for the filing of charges under civil rights statutes, it has sometimes chosen a limit of 180 days. *See* 42 U.S.C. §2000e-5(e) (§706(e) of Title VII of the Civil Rights Act of 1964, as amended); 42 U.S.C. §3610(b) (§810 of Title VIII of the Civil Rights Act of 1968). I recognize, of course, that it may require more time to prepare a complaint to be filed in federal district court than to bring a charge with the Equal Employment Opportunity Commission under 42 U.S.C. §2000e-5 or with the Secretary of Housing and Urban Development under 42 U.S.C. §3610. On the other hand, the federal rules permit liberal amendments of complaints brought in district court, and so a time limit on federal complaints may not be as burdensome as it seems.
In the present case the same facts that give rise to the plaintiff's section 1983 action also form the basis of her Title VII claim. The panel does not explain why Congress, although giving the plaintiff only six months to file her Title VII charge with the EEOC, could not have intended for the federal courts to borrow a six-month statutes of limitation to bar the plaintiff's section 1983 action.

not even rely on the special nature of employment discrimination cases; it appears to indicate that six months is too short in *all* types of section 1983 actions. Thus the panel seemingly would make it impossible to borrow a six-month statute even in section 1983 actions that easily could be commenced within six months. I cannot see why, for example, a prisoner alleging that the warden improperly deprived him of some of his property could not be expected to file a complaint within six months. Yet a large proportion of section 1983 actions are brought by prisoners making allegations such as this.

In sum, I believe that this case warrants rehearing before the entire court because it appears that the panel, in disregard of *Tomanio*, neither considered the state policies involved nor identified with any specificity the federal policies, and also because I am concerned about the creation of a split among the circuits on this highly important issue.

Judges Hunter, Weis, and Garth join in this statement.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MADELIN H. KNOLL, Plaintiff	:	
	:	
v.	:	
	:	
SPRINGFIELD TOWNSHIP SCHOOL DISTRICT, a political subdivision of the Commonwealth of Pennsylvania;	:	CIVIL
LOUIS A. ROMAN, Superintendent, Springfield Township School District;	:	ACTION
JOHN J. LAWN, MARIE M. HANSHAW, JAMES A. COMMINS, SARA LEE GOREN, WILLIAM C. HOCH, JR., E. BURKE HOGUE, JR., SALLY KALISH, MAX L. LIEBERMAN, and HARPUR M. TOBIN, individually and as members of the Board of School Directors, Springfield Township School District, Defendants	:	NO. 81-1626

COMPLAINT

Plaintiff, Madelin H. Knoll, by her attorneys, Kirschner, Walters & Wilig, as and for a Complaint in the above-captioned matter, hereby states to the Court as follows:

Preliminary Statement

1. This is an action under 42 U.S.C. §1983 and Title VII of the Civil Rightrs Act of 1964, *as amended*, 42 U.S.C. §2000e *et seq.*, to remedy employment discrimination on the basis of sex and under color of state law. In September; 1980, Piaintiff Madelin Knoll was denied consideration for the post of Assistant Superintendent of the Springfield Township School District. The job in fact went to a male teacher with less qualifications than Plaintiff. The decision not to promote Ms. Knoll is merely the last in a series of discriminatory practices against

Plaintiff by Defendants. Plaintiff seeks declaratory and injunctive relief, as well as compensatory and punitive damages.

Jurisdiction

2. This action arises under Section 703 of the Civil Rights Act of 1964, 78 Stat. 260 *as amended*, 86 Stat. 104-105, 42 U.S.C. §2000e-2 (hereinafter "Title VII"), 42 U.S.C. §1983, and the Fourteenth Amendment to the United States Constitution. This Court has jurisdiction pursuant to 28 U.S.C. §§1331, 1343, 2201, 2202, and 42 U.S.C. §2000e-5(f)(3).

Parties

3. Plaintiff, Madelin H. Knoll, is an adult female citizen of the United States, with her principal residence at 1432 Fort Washington Avenue, Ambler, Pennsylvania 19002. At all times relevant to this Complaint, Plaintiff has been an employee of Defendant within the meaning of Section 701(f) of the Act, 42 U.S.C. §2000e(f).

4. Defendant, Springfield Township School District (hereinafter "the School District"), is a political subdivision of the Commonwealth of Pennsylvania which exists for the purpose of providing education to children in that area. Its principal place of business is 1901 East Papermill Road, Oreland, Pennsylvania 19075. The Schoo! District is an employer within the meaning of Section 701(b) of the Act, 42 U.S.C. §2000e(b).

5. Defendant, Louis A. Roman, is Superintendent of Defendant School District and resides at 1204 St. Clair Road, Oreland, Pennsylvania 19075. He is being used individually and in his official capacity.

6. Defendant, John J. Lawn, is President of the Board of School Directors of Defendant School District and resides at 700 Avondale Road, Erdenheim, Pennsylvania 19118. He is being sued individually and in his official capacity.

7. Defendant, Marie M. Hanshaw, is Vice-President of the Board of School Directors of Defendant School District and resides at 422 Oreland Mill Road, Oreland, Pennsylvania 19075. She is being sued individually and in her official capacity.

8. Defendant, James A. Commins, is a member of the Board of School Directors of Defendant School District and resides at 7708 Orchard Way, Wyndmoor, Pennsylvania 19118. He is being sued individually and in his official capacity.

9. Defendant, Sara Lee Goren, is a member of the Board of School Directors of Defendant School District and resides at 1904 Quill Lane, Oreland, Pennsylvania 19075. She is being sued individually and in her official capacity.

10. Defendant, William C. Hoch, Jr. is a member of the Board of School Directors of Defendant School District and resides at 1004 Cromwell Road, Wyndmoor, Pennsylvania 19118. He is being sued individually and in his official capacity.

11. Defendant, E. Burke Hogue, Jr., is a member of the Board of School Directors of Defendant School District and resides at 309 Willow Road, Oreland, Pennsylvania 19075. He is being sued individually and in his official capacity.

12. Defendant, Sally Kalish, is a member of the Board of School Directors of Defendant School District and resides at 8812 Hawthorn Lane, Wyndmoor, Pennsylvania 19118. She is being sued individually and in her official capacity.

13. Defendant, Max L. Lieberman, is a member of the Board of School Directors of Defendant School District and resides at 311 Longfield Road, Erdenheim, Pennsylvania 19118. He is being sued individually and in his official capacity.

14. Defendant, Harpur M. Tobin, is a member of the Board of School Directors of Defendant School District and resides at 200 Suffolk Road, Flourtown, Pennsylvania 19031. He is being sued individually and in his official capacity.

Factual Allegations

15. Plaintiff Knoll has been employed as a full-time educational professional by Defendant since 1968. During that time, she has served as Reading Consultant to the School District, reading resource teacher, ESEA Title I reading teacher in the parochial schools, and third grade teacher. As Reading Consultant, Plaintiff occupied a central administrative position.

16. Plaintiff Knoll was awarded a Doctorate degree in education from Temple University, Philadelphia, Pennsylvania in 1968. She has been certified by the Pennsylvania Department of Education as qualified to be an elementary teacher, reading specialist, supervisor of reading and elementary principal in the public schools in the Commonwealth of Pennsylvania. Plaintiff has further been certified and awarded a letter of eligibility from the Pennsylvania Department of Education to be a District Superintendent.

17. In July, 1979, Plaintiff Knoll applied for a vacancy as Administrative Assistant to the Superintendent of the School District. Plaintiff was fully qualified and certified for the position.

18. On or about August 2, 1979, Plaintiff was notified by Superintendent Louis A. Roman that she had not been selected as Administrative Assistant. Instead, the position went to Frank Romano, a male applicant, with less qualifications for the position and who, at that time, was not appropriately certified by the Pennsylvania Department of Education.

19. In August 1979, Superintendent Roman promised Plaintiff Knoll that he would create an administrative position for her during the school year 1979-80, as compensation for not having chosen her for the position of Administrative Assistant. Nevertheless, no such position was created. On or about May 28, 1980, Superin-

tendent Roman notified Plaintiff Knoll by letter that he woud not, in fact, create such a position for her during the school year 1980-81.

20. In September 1980, Administrative Assistant Frank Romano was promoted to Assistant Superintendent, a position which had existed in the past but was recreated at that time.

21. Although Defendant School District, its officers, agents and representatives, knew that Plaintiff Knoll was ready, willing, able and qualified to assume the position of Assistant Superintendent in September 1980, she was not offered an opportunity to compete for the vacancy and was not considered for same because of her sex.

22. The decisions not to promote Plaintiff Knoll into an administrative position in July 1979, May 1980 and September 1980, were the result of a continuing policy of discrimination against Plaintiff on the basis of sex by the School District and its officers, agents and representatives acting within the scope of their authority and on behalf of the School District.

23. The decisions not to promote Plaintiff Knoll were made by all of the individually named Defendants acting separately and together under color of state statute, ordinance, regulation, custom, and/or usage, to deprive Plaintiff of her rights, privileges and immunities as secured by the laws and Constitution of the United States.

24. Defendant School District employs approximately seven persons in top administrative, supervisory positions. Only one of these persons is a female.

25. As a result of Defendants' illegal and discriminatory acts, Plaintiff has been unable to advance her professional career and has suffered a resultant loss of salary, financial benefits, status and prestige, and further opportunities for professional advancement. Plaintiff has further suffered embarrassment, emotional duress, and mental pain and anguish.

26. As a result of Defendants' illegal and discriminatory conduct, Plaintiff has suffered immediate and irreparable harm for which there is no adequate remedy at law.

27. On or about December 12, 1980, Plaintiff filed a charge with the Philadelphia Office of the Equal Employment Opportunity Commission, alleging discrimination by the School District in the manner set forth in Paragraphs 15 through 25, above. A copy of that charge is attached hereto as Exhibit "A".

28. On or about January 28, 1981, the Equal Employment Opportunity Commission issued Plaintiff a Right to Sue letter in this matter, a copy of which is attached hereto as Exhibit "B".

29. Plaintiff has exhausted her administrative remedies as prescribed by law and has met the jurisdictional prerequisites to a Title VII action.

FIRST CAUSE OF ACTION

30. By its actions as described in Paragraphs 1 through 29, *supra*, the Springfield Township School District has discriminated against Plaintiff on the basis of sex, in violation of Section 703 of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. §2000e-2.

SECOND CAUSE OF ACTION

31. By their actions as described in Paragraphs 1 through 29, *supra*, Defendants have jointly and severally acted under color of state law to deny Plaintiff the equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution, in violation of 42 U.S.C. §1983.

WHEREFORE, Plaintiff prays that this Court:

1. Enter a declaratory judgment that Defendant's failure and refusal to promote Plaintiff was

caused by employment discrimination on the basis of sex, in violation of 42 U.S.C. §1983 and Section 703 of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. §2000e, *et seq.*;

2. Issue an Order permanently enjoining Defendants, their officers, agents and representatives, from discriminating against Plaintiff on the basis of sex, and ordering Defendant to hire Plaintiff at an administrative position, comparable to that of Assistant Superintendent, for which she is qualified;

3. Award Plaintiff equitable restitution, compensatory and punitive damages in an amount in excess of Ten Thousand Dollars ($10,000.00), together with all costs and attorneys fees incurred by Plaintiff in her attempt to vindicate her rights; and

4. Grant such other and further relief as the Court deems just and necessary.

Dated this 21st day of April, 1981.

KIRSCHNER, WALTERS & WILLIG

BY: _____

Theodore M. Lieverman
Attorneys for Plaintiff
1429 Walnut Street
Philadelphia, PA 19102
(215) 665-2722

(PLEASE PRINT OR TYPE)

ROVED BY GAO
- 180541 (R0511)
pires 1-31-81

CHARGE OF DISCRIMINATION

IMPORTANT: This form is affected by the Privacy Act of 1974, see Privacy Act Statement on reverse before completing it.

CHARGE NUMBER(S) (AGENCY USE ONLY)

☐ STATE/LOCAL AGENCY

☐ EEOC 09810642

ual Employment Opportunity Commission and
(State or Local Agency)

AME (Indicate Mr., Ms. or Mrs.)
Ms. Madelin Knoll

HOME TELEPHONE NUMBER (Include area code)
215-646-6214

REET ADDRESS
1432 Fort Washington Avenue

COUNTY
Montgomery

TY, STATE, AND ZIP CODE
Ambler, Pa. 19002

AMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR OCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME. (If more than one list below).

AME
Springfield Township School District

TELEPHONE NUMBER (Include area code)
215-233-6000

REET ADDRESS
1901 E. Paper Mill Road

CITY, STATE, AND ZIP CODE
Oreland, Pa. 19075

AME

TELEPHONE NUMBER (Include area code)

REET ADDRESS

CITY, STATE, AND ZIP CODE

USE OF DISCRIMINATION BASED ON MY (Check appropriate box(es))

☐ RACE ☐ COLOR ☒ SEX ☐ RELIGION ☐ NATIONAL ORIGIN ☐ OTHER (Specify)
female

ATE MOST RECENT OR CONTINUING DISCRIMINATION TOOK ACE (Month, day, and year)
September 1980

E PARTICULARS ARE:

I was hired by Respondent in 1968. In July 1979, I applied for a position as Administrative Assistant. I was not selected for the position. In August 1979, Respondent promised to create an administrative position for me. On May 28, 1980, I was informed that no position would be created for me. Because I was denied the position of Administrative Assistant, coupled with Respondent's failure to create an administrative position for me, as promised, I was denied the opportunity to be considered for the position of Assistant Superintendent in September 1980.

I was informed by Lou Roman, Superintendent, that an administrative position would be created for me. Respondent gave no reason for not creating the administrative position.

I believe that I have been discriminated against because of my sex, female, for the following reasons:

1. In July 1979, I applied for a position as Administrative Assistant. I was fully qualified and certified for the position. Frank Romano (M), who was not certified, was selected for the position as Administrative Assistant.

2. In August 1979, Lou Roman, Superintendent, orally promised to create an administrative position for me during school year 1979-80.

3. On May 28, 1980, I was informed by a letter from Mr. Roman that no new administrative position had been created for would there be one created during school year 1980-81.

will advise the agencies if I change my address or telephone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

declare under penalty of perjury that the foregoing is true and correct.

NOTARY — (When necessary to meet State and Local Requirements)

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief

SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE
(Day, month, and year)

EXHIBIT "A"

ATE
CHARGING PARTY (Signature)

EEOC FORM 5 (5-78) PREVIOUS EDITIONS OF ALL EEOC FORM 5S ARE OBSOLETE AND MUST NOT BE USED

RESPONDENT'S COPY

A-43

BEST AVAILABLE COPY

E OF DISCRIMINATION	CHARGE NUMBER(S) AGENCY USE ONLY
	STATE/LOCAL AGENCY
	EEOC 03810642

ging Party --- Knoll

ondent ----- Springfield Township School District.

4. In September 1980, Frank Romano, Administrative Assistant, was promoted to Assistant Superintendent.

5. It is my belief that had I been selected for the position of Administrative Assistant in July 1979, I would have been promoted to Assistant Superintendent in September 1980.

6. Respondent employs approximately seven (7) employees in top administrative positions of whom only one (1) is female.

I declare under penalty of perjury that the foregoing is true and correct.

Date

Signature (Charging Party)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE
(Dismissal)

TO:
Ms. Madeline Knoll
1432 Fort Washington Avenue
Ambler Pa. 19002

FROM:
Equal Employment Opportunity Commission
Philadelphia District Office
127 North Fourth Street
Philadelphia, Pennsylvania 19106

Charge Number	EEOC Representative	Telephone Number
031810642	Legal Unit	215-597-0881

(See Section 706(f)(1) and (f)(3) of the Civil Rights Act of 1964 on reverse of this form.)

This is your NOTICE OF RIGHT TO SUE. It is issued because the Commission has dismissed your charge. Your charge was dismissed for the following reason:

☒ No jurisdiction, therefore the Commission has no authority to process your charge further.

☐ No reasonable cause was found to believe that the allegations made in your charge are true, as indicated in the attached determination.

☐ You failed to provide requested necessary information, failed or refused to appear or be available for necessary interviews/conferences or otherwise refused to coperate to the extent that the Commission has been unable to resolve your charge. You have had more than 30 days in which to respond to our final written request.

☐ The Commission has made reasonable efforts to locate you and has been unable to do so. You have had at least 30 days in which to respond to a notice sent to your last known address.

☐ The respondent has made a written settlement offer which affords full relief for the harm you alleged. At

least 30 days have expired since you received actual notice of this settlement offer.

The issuance of this NOTICE OF RIGHT TO SUE terminates the Commission's processing of your charge. If you want to pursue your charge further, you have the right to sue the respondent(s) named in your charge in United States District Court. IF YOU DECIDE TO SUE, YOU MUST DO SO WITHIN NINETY (90) DAYS FROM THE RECEIPT OF THIS NOTICE OF RIGHT TO SUE; OTHERWISE YOUR RIGHT TO SUE IS LOST.

If you cannot afford or have been unable to obtain a lawyer to represent you, you should be aware that the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-5(f)(1) permits the U. S. Distrit Court having jurisdiction in your case to appoint a lawyer to represent you. If you plan to request apointment of a lawyer to represent you, you must make this request of the U. S. District Court in the form and manner it requires. *Your request to the U. S. District Court should be made well in advance of the end of the 90-day period mentioned above.*

You may contact the EEOC representative named above if you have any questions about your legal rights including advice on which U. S. District Court has jurisdiction to hear your case or if you need to inspect and copy information contained in the Commission case file.

An information copy of this Notice of Right to Sue has been sent to the respondent(s) shown below.

On Behalf of the Commission

January 28, 1981 — Johnny J. Butler, District Attorney

(Date) — *(Typed Name and Title of EEOC Official)*

cc: Springfield Township School District
Theodore M. Lieverman, Esq.
Charles Potash, Esq.

EXHIBIT "B"

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

PHILADELPHIA DISTRICT OFFICE
127 N. FOURTH STREET
PHILADELPHIA, PENNSYLVANIA 19106

031810642	Charge Number:
Madelin Knoll	Charging Party
and	
Springfield Township School District	Respondent

DISMISSAL

Under the authority vested in me by the Commission's Procedural Regulations, I issue on behalf of the Commission, the following determination dismissing the charge because it was untimely filed.

A charge of discrimination such as this must be filed within 180 days after the alleged violation. This charge was received more than 180 days after the date of the alleged violation. I dismiss the charge because it was untimely filed. Thus I make no determination as to whether or not Respondent actually engaged in unlawful conduct under Title VII as alleged in the charge. Such determination may be made by the Commission only with respect to charges filed within the time limitation set in Title VII.

This dismissal concludes the Commission's processing of this charge. Should the Charging Party wish to pursue this matter further, one may do so by filing a private action in Federal District Court against the Respondent named above within 90 days of receipt of this

letter and by taking the other procedural steps set out in the enclosed NOTICE OF RIGHT TO SUE.

On behalf of the Commission

Johnny J. Butler
District Director

1/22/81
(date)

Enclosures: (2)
Notice of Right to Sue
Copy of the Charge